LE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 218

L. E. DOGGETT,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DANIEL R. DIXON,
Counsel for Petitioner
508 Capital City Building
Raleigh, North Carolina

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

	Page
I. Opinions Below	1
II. Jurisdiction	2
III. Questions Presented	2
IV. Constitutional Provision, Statutes, and Regulations	3
V. Statement of Facts	4
(a) Basis for Federal Jurisdiction	4
(b) Background Information	4
(c) Facts in Respect to Question (a)	5
(d) Facts in Respect to Question (b)	7
(e) Facts in Respect to Question (c)	10
VI. Reasons for Granting the Writ	11
(a) The Decision Below Denies Petitioner Due Process of Law by Holding That Credibility Can be Accorded a Witness Whose Testimony Is Essential to the Government's Burden of Proof, Where Such Witness Is Concededly Giving False Testimony as to the Principal Issue in the Case	11
(b) The Decision Below Denies Petitioner Due Process of Law by Arbitrarily Refusing to Make a Finding of Fact Which Was Supported by Cumulative Testimony of Three Unimpeached Witnesses, Where Such Finding of Fact Would Exculpate Petitioner of Knowledge of False Entries in His Books	15
(c) The Decision Below Denies Petitioner Due Process of Law by Making Findings of Fact Which Are Not Supported by Any Lawful Evidence	19
(d) The Decision Below Is in Conflict With a Decision of the Seventh Circuit	20
VII. Conclusion	21

Page

Appendix A—Constitutional Provision, Statutes and Rules 1a

Appendix B—Opinions and Judgments Below 4a

Tax Court of the United States

Opinion 4a
Decision 19a

United States Court of Appeals for the Fourth Circuit

Opinion 20a
Judgment 28a

Appendix C—Conflicting Opinion 29a

CITATIONS

Cases:

Green v. *McElroy*, 360 U.S. 474 (1959) 14
Mack, U. S. v., 249 F. 2d 321 (7th Cir. 1957) cert. denied, 356 U.S. 920 (1955) 16, 29a
Murchison, In Re, 349 U.S. 133 (1955) 18

Constitutional Provision:

Constitution of the United States, Amendment V ..21, 1a

Statutes:

Internal Revenue Code of 1954:

Sec. 7453(b) (26 U.S.C., 1958 ed., Sec. 7453(b)) ..17, 1a
Sec. 7454(a) (26 U.S.C., 1958 ed., Sec. 7454(a)) 11, 14, 1a

Internal Revenue Code of 1939:

Sec. 275(a) (26 U.S.C., 1952 ed., Sec. 275(a)) ...4, 1a
Sec. 276(b) (26 U.S.C., 1952 ed., Sec. 276(b)) ...4, 2a
Sec. 293(b) (26 U.S.C., 1952 ed., Sec. 293(b)) ...4, 2a
Sec. 3793(b) (26 U.S.C., 1952 ed., Sec. 3793(b)) ..13, 2a

District of Columbia Code:

Sec. 14-104 (D.C. Code, 1951 ed., Sec. 14-104) 17, 2a

MISCELLANEOUS:

Page

Federal Rules of Civil Procedure:
Rule 52(a) 3a

Rules of Practice Before the Tax Court of the United States:
Rule 31(f) 16, 3a

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No.

I. E. DOGGETT,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

I. E. Doggett, the petitioner herein, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in the above-entitled case on March 8, 1960.

I

OPINIONS BELOW

The memorandum opinion of the Tax Court of the United States is unreported in an official edition but is reported in 1958 P-H T.C. Mem. Dec., Par. 58,176. The Tax Court opinion appears in the certified copy of the record filed in this cause (R. 1a) and is also printed in Appendix B hereto. (p. 4a).

The opinion of the United States Court of Appeals for the Fourth Circuit is reported in 275 F. 2d 823 and is also printed in Appendix B hereto. (p. 20a).

II

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was filed and entered on March 8, 1960. (Ap. 28a). The time within which petitioners were permitted to file the petition for a writ of certiorari was extended to and including July 6, 1960 by order of this Court entered June 6, 1960.

The jurisdiction of this Court is invoked under the provisions of 26 U.S.C., Section 7482 and 28 U.S.C., Section 1254.

III

QUESTIONS PRESENTED

(a) Whether or not petitioner has been denied due process of law by the courts below where respondent's burden of proof as to the issue of fraud was held to have been carried by the testimony of a single witness (the bookkeeper) and that witness was conceded by respondent and the court below to have given false testimony as to the principal issue in the case?

(b) Whether or not petitioner has been denied due process of law by the courts below by the refusal of said courts to make a finding of fact which would exculpate petitioner of knowledge of false entries in his books where such fact was testified to by three unimpeached witnesses in addition to the petitioner and was not controverted by any lawful evidence?

(c) Whether or not petitioner has been denied due process of law by the action of the court below in

making findings of fact not supported by any lawful evidence?

(d) In the event petition for *certiorari* is granted, petitioner raises the further question of whether or not a conviction following a plea of *nolo contendere* can impeach the entire testimony of such witness thereby reducing witness to the status of an incompetent witness?

IV

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

(a) Constitution of the United States, Amendment Five. (Ap. A., p. 1a).

(b) Internal Revenue Code of 1954, Section 7453. (Ap. A., p. 1a).

(c) Internal Revenue Code of 1954, Section 7454. (Ap. A., p. 1a).

(d) Internal Revenue Code of 1939, Section 275. (Ap. A., p. 1a).

(e) Internal Revenue Code of 1939, Section 276. (Ap. A., p. 2a).

(f) Internal Revenue Code of 1939, Section 293. (Ap. A., p. 2a).

(g) Internal Revenue Code of 1939, Section 3793. (Ap. A., p. 2a).

(h) District of Columbia Code, Section 14-104. (Ap. A., p. 2a).

(i) Federal Rules of Civil Procedure, Rule 52(a). (Ap. A., p. 3a).

(j) Rules of Practice Before the Tax Court of the United States, Rule 31(f). (Ap. A., p. 3a).

V

STATEMENT OF FACTS

(a) Basis for Federal Jurisdiction in Court of First Instance:

The basis for federal jurisdiction in the Tax Court of The United States is found in Section 7442 of the Internal Revenue Code of 1954. (26 U.S.C., Section 7442, 1958 ed.).

(b) Background Information:

The Tax Court determined that the petitioner herein was liable for additional income taxes and penalties for fraud for the following years and in the following amounts: (Ap. 19a):

Year	Income Tax	Additions to Tax I.R.C. 1939 Section 293 (b)
1942	4,776.49	2,388.25
1943	13,201.92	5,419.37
1944	29,079.99	14,540.00
1945	9,662.26	4,831.13
1946	7,526.82	3,763.41

The deficiency notice was mailed to the petitioner on April 22, 1953 more than 3 years after the return was filed. (Ap. 6a). (I.R.C. 1939, Sections 275 and 276, Ap. 1a, 2a).

Petitioner executed waivers of the statute of limitations in respect to the taxable and calendar year of 1943. (Ap. 5a).

Petitioner is the owner and operator of Yellow Cab Company of Raleigh, Inc. of Raleigh, North Carolina. He started in the cab business as proprietor of Strop. Taxi Company in 1933 and operated as a proprietorship until April 30, 1946. As of that date, he formed

two corporations, the Yellow Cab Company of Raleigh, Inc. and the Strop Taxi Company, Inc. During the period 1933 to 1946 his cab fleet increased from 8 cabs to 50 cabs. (Ap. 6a).

Petitioner hired Linwood T. Hobgood as a bookkeeper in April of 1941. Hobgood remained employed in that capacity until February, 1947. (Ap. 6a).

During the taxable years 1942-1946, inclusive, petitioner reported and paid Federal income taxes as follows:

1942	9,452.73	Ex. 2-B
1943	29,523.96	Ex. 3-C
1944	23,182.93	Ex. 4-D
1945	22,677.84	Ex. 5-E
1946	3,951.23	Ex. 6-F
	88,788.69	
Less:		
1943 Forgiveness	9,452.73	
Total	79,335.96	

Petitioner's returns for each of the years 1942-1946, inclusive, were prepared by A. M. Pullen and Company, Certified Public Accountant's of Raleigh, North Carolina. (Ap. 6a).

Petitioner is a person of minimal education having quit school in the fourth grade and can read and write very little. (Tr. 238-239, Ap. 21a).

(c) Facts in Respect to Question (a):

The Tax Court made the following finding in its opinion (Ap. 16a):

> "This is not a case where any question of burden of proof can successfully be raised. Cf. *Oscar G.*

Joseph, 32 B.T.A. 1192. Once the bookkeeper is believed as to petitioner's obeyed instructions to falsify the books in order to understate income, all the proof of fraud necessary is furnished. *Jack M. Chesbro*, 21 T.C. 123, affirmed per curiam (C.A. 2) 225 F. 2d 674, *certiorari* denied 350 U.S. 995; *Fred Ascher*, 2 B.T.A. 1257.

Hobgood testified that he kept the journal and ledgers exclusively. (R. 36a). *All* false entries appearing in the journals and ledgers were thus made by Hobgood. Hobgood testified that *all* false entries were made by him for the purpose of understating petitioner's taxable income. (R. 42a). Hobgood also testified that he took no money from the business except his salary. (R. 43a). Respondent conceded at trial that there were "some" false entries which could not and did not produce a tax benefit to petitioner. (R. 39a-40a). The court below referred to these entries as follows: (Ap. 21a-23a):

> " . . . Fraud there clearly was; the only question was whose." (Ap. 21a).
>
> * * * * *
>
> "The taxpayer brushes aside the testimony of the bookkeeper as perjured and seeks to avoid the finding that he was the profiteer and that his income tax returns were fraudulent, by concentration upon a permissible inference that the bookkeeper was an embezzler." (Ap. 22a).
>
> * * * * *
>
> "(Footnote 2.) The bookkeeper testified that the taxpayer got all of the money and that he took none." (Ap. 22a).
>
> * * * * *
>
> "First the taxpayer points to the fact that his drawing account debits were overfooted by an

aggregate of $172.35 in 1942 and by an aggregate of $1,200.00 in 1943, . . ." (Ap. 23a).

* * * * *

" . . . Because of the number and frequency of the entries which aggregate these small totals, he finds no room for an inference that they were made inadvertently and he dismisses the bookkeepers explanation that they were made during moments of pique." (Ap. 23a).

* * * * *

" . . . Proof that he embezzled some small items may warrant an inference that he was the sole wrongdoer, . . ." (Ap. 23a).

The records in this proceeding showed that there was a pattern of regular and systematic overfooting of the drawing account of petitioner by Hobgood. (R. 39a-40a, Ap. 23a).

When questioned as to the reasons for these entries, Hobgood replied that he was "teed off" at him (the petitioner) and that "I won't cover it up. I will just charge it to him." (R. 40a). Falsification because of "pique" is deliberate, not "inadvertent".

The drawing account was overfooted in identically the same manner as were the expense accounts. (R. 39a). Overfooting a drawing account *cannot* produce a tax benefit.

(d) Facts in Respect to Question (b):

In April and May of 1947 Internal Revenue Agent Lawrence M. Armstrong made a routine examination of the books of the petitioner. Agent Armstrong had *completed* his investigation and sought to procure an agreement to a proposed deficiency of six to eight thousand dollars. (R. 22a-23a).

Petitioner vigorously objected to the proposed deficiency. (R. 22a). A heated discussion followed. A memorandum cash book was produced during this discussion. (R. 22a, 29a). This memorandum cash book disclosed discrepancies in the regular journal which as stated by the court below "was the key that opened the door to further inquiry and to the fraud charge." (Ap. 24a).

Petitioner testified he gave this book to the agent to prove he owed no more taxes. (R. 30a). Petitioner's wife testified she was present during the altercation between agent Armstrong and Mr. Doggett and saw Mr. Doggett give the book to Mr. Armstrong. (R. 32a). Mr. Bishop testified he was present during the altercation between Mr. Armstrong and Mr. Doggett and saw Mr. Doggett give the book to Mr. Armstrong. (R. 25a). Mr. Armstrong testified that he was not sure who gave him the book but he thinks Mr. Hill did. (R. 23a). Mr. Armstrong further testified he did not know where the book was kept. (R. 24a). In his affidavit, introduced in evidence over objection, Mr. Armstrong stated:

> " . . . I can't remember exactly how I happened to get the small cash book referred to but I do remember that it came from the safe which the taxpayer had in his office. I believe that it was discovered as a result of Mr. Griffin and I trying to find something that would show where the figures on the journal came from . . . Mr. Doggett did not give me the book and I don't remember that he even knew that I saw the book." (R. 10-11).

The court below in its opinion made the following statements in respect to the false entries:

> "To some extent the deficiencies were attributable to adjustments which, in themselves, carry

no implication of fraud. Other portions of the deficiencies, however, were the direct result of falsified records. Fraud, there clearly was; the only question is whose." (Ap. 21a).

* * * * *

"The taxpayer next refers to his testimony, supported by that of his wife and one of his employees, that he voluntarily produced the cash book and gave it to the revenue agent, from which he argues that the Tax Court was required to draw the inference that the taxpayer was not informed of the discrepancies between the cash book and the journal.

The testimony if believed, would support the inference." (Ap. 23a).

In respect to the affidavit, the court below said:

" . . . Shown an affidavit he had executed at a time more nearly contemporaneous with the event, he stated the affidavit was correct. In the affidavit he had sworn that he found the cash book in a safe in the taxpayer's office and that the taxpayer had not given it to him."[5] (Ap. 24a).

* * * * *

"Footnote 5. The taxpayer contends, erroneously, that this was the use of an ex parte affidavit as evidence." (Ap. 24a).

In respect to the procedure followed in maintaining and keeping the cash book in controversy, the Tax Court made the following finding of fact:

" . . . The cash book was kept for petitioners information and was not maintained with the journals and ledgers in the filing cabinet but was kept separately in Hobgood's desk drawer. When a cash book was filled it was stored on the top shelf of a large wooden cabinet." (Ap. 8a).

(e) Facts in Respect to Question (c):

The findings of the court below pertinent to this question are as follows:

> "The Tax Court accepted the bookkeeper's version of the matter and found corroboration fit in a *number of collateral circumstances.*" (Ap. 21a). (Emphasis added).
>
> * * * * *
>
> ". . . Proof that he embezzled some small items may warrant an inference that he was the sole wrong doer, but *it does not make incredible all the direct and circumstantial evidence of the taxpayer's wrongdoing.*" (Ap. 23a) (Emphasis added).

Agent Armstrong asked petitioner if he could examine the contents of his lock box around noon on Friday, May 9, 1947. Petitioner was alone at the time and could not leave his place of business. Petitioner offered to go with the agent immediately after someone came to relieve him but Agent Armstrong declined to go Friday afternoon or the following Saturday. (R. 27a-30a).

Thereafter petitioner received a call from his attorney to procure some papers from his lock box. When his relief came, petitioner went to his lock box and procured the requested papers. (R. 30a).

Petitioner's former wife had taken cash from his lock box and as a result of this incident petitioner stopped keeping his cash in the lock box. (Ap. 25a, Tr. 295). Petitioner kept his cash in his office safe and such finding of fact was made by the Tax Court. (Ap. 8a). Petitioner was short of funds and forced to borrow $10,000.00 from the bank during the middle of February. (Tr. 246). The lock box incident occurred on May 9, 1947. (R. 41).

VI

REASONS FOR GRANTING THE WRIT

(a) The Decision Below Denies Petitioner Due Process of Law by Holding That Credibility Can Be Accorded a Witness Whose Testimony is Essential to the Government's Burden of Proof. Where Such Witness Is Concededly Giving False Testimony as to the Principal Issue in the Case.

The Tax Court made the following finding in its opinion:

> "This is not a case where any question of burden of proof can successfully be raised. Cf. *Oscar G. Joseph*, 32 B.T.A. 1192. *Once the bookkeeper is believed* as to petitioners obeyed instructions to falsify the books in order to understate income, *all the proof of fraud necessary is furnished.*" (Ap. 16a). (Emphasis added)

It is respectfully submitted that a fair interpretation of the above language is that the Tax Court resolved the question of the commissioner's burden of proof by its determination that credibility be accorded the testimony of the bookkepper. (I.R.C. of 1954, Sec. 7454(a)).

The reason for the false entries in the ledgers and journals is the entire foundation of this case. No fraud charge was contemplated against petitioner until the discovery of the false entries was made *after* the Agent had completed his routine examination.

Hobgood testified that all false entries were made to reduce petitioner's taxes and further testified that he took none of the petitioner's money. The existence of these entries, which were conceded to have been made by Hobgood and which were conceded to not produce a tax benefit, conclusively prove that Hobgood was giving false testimony.

The court below stated:

"The taxpayer brushes aside the testimony of the bookkeeper as perjured, and seeks to avoid the finding that he was the profiteer and that his income tax returns were fraudulent, by concentration upon a *permissible* inference that the bookkeeper was an embezzler."[2] (Ap. 22a) (Emphasis added)

* * * * *

Footnote 2. "The bookkeeper testified that the taxpayer got all of the money and that he took none."

* * * * *

" . . . Proof that he embezzled some small items . . ." (Ap. 23a).

The court below, in effect, conceded that the bookkeeper was an embezzler. This would again make Hobgood a perjurer for he testified he took none of the money.

In seeking to explain these entries which produced no tax benefit Hobgood stated that he was "teed off" and "I won't cover it up. I will just charge it to him." The records show that the drawing account was *overfooted*. In other words, the amounts *were not* charged to petitioner by making entry and they *were* "covered up." This is the third clear instance of perjury. There are many others not pertinent to this petition found in the record.

The court below refers to the embezzlements as small, only aggregating $172.35 in 1942 and $1,200.00 in 1943. These amounts *do not prove the amount* of the embezzlements. They prove the *fact* of embezzlement and the *fact* of perjury because these amounts *could not* result in a tax benefit to petitioner. The *amounts* of the embezzlement, are alleged by petitioner to be large ($29,009.50) and fully supported by petitioner's orig-

inal brief filed in the Tax Court. (Ap. 10a). However, such amounts are not essential to a consideration of this petition.

The court below further said:

> " . . . Fraud there clearly was; the only question is whose." (Ap. 21a).

This improperly puts the question. Since Hobgood *admitted* he made all false entries, the fraud was clearly Hobgood's. (I.R.C. of 1939, Sec. 3793(b)). The questions are: *Why* did Hobgood make such false entries and did petitioner *know* of the false entries?

The court below further said:

> " . . . To the commissioner, the fact that the bookkeeper has never been charged with embezzlement, or any other crime, raises one inference, but, to the taxpayer, justifies none." (Ap. 25a).

The Commissioner's inference, presumptively of Hobgood's innocence because he has not been prosecuted, would seem to border on the incredible when it is considered that all falsifications were in Hobgood's handwriting, were confessed to by Hobgood and manifestly constitute a felony under the Internal Revenue Laws. (I.R.C. of 1939, Sec. 3793(b)). The evidence of embezzlement was fully developed in the proceedings below. The cloak of immunity thrown over Hobgood by the decisions of the courts below effectively prevent prosecution of Hobgood. The question remains, however, as to why Hobgood was not prosecuted by the United States Department of Justice during the long years from 1947 when his falsifications were discovered until today.

It is submitted Hobgood made these false entries for the purpose of covering his embezzlement activities by providing an alibi if detected by the government and to coerce his employer into silence if detected by his employer. That the petitioner had no knowledge of such false entries is proven by the evidence which was suppressed or ignored as shown in the Parts V(d) and VI(b) of this petition.

The burden of proof as to the issue of fraud is imposed on the Commissioner by statute. (26 U.S.C., Section 7454, A, p. 1a).

In *Green v. McElroy*, 360 U.S. 474, 496 (1959) this Court said:

> "Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity *to show that it is untrue*. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination." (Emphasis added).

From the above, it would seem that upon *discovery* of the untruth and upon *discovery* of the perjury that fair thinking and unbiased treatment would require that such testimony be discounted.

(b) The Decision Below Denies Petitioner Due Process of Law by Arbitrarily Refusing to Make a Finding of Fact Which Was Supported by Cumulative Testimony of Three Unimpeached Witnesses, Where such Finding of Fact Would Exculpate Petitioner of Knowledge of False Entries in His Books.

In respect to this point the court below said (R. 89):

"The taxpayer next refers to his testimony, supported by that of his wife and one of his employees, that he voluntarily produced the cash book and gave it to the revenue agent, from which he argues that the Tax Court was required to draw the inference that the taxpayer was not informed of the discrepancies between the cash book and the journal." (Ap. 23a).

"*The testimony, if believed, would support the inference . . . If the taxpayer knew of the discrepancies between the cash book and the journal, it would have been an unreasoned thing to have done what he says he did.* (Ap. 23a-24a) (Emphasis added).

" . . . Aside from the improbabilities which inhere in it, there was the testimony of the revenue agent. That official testified at the trial he had not seen the cash book until his routine examination was complete, but he had no present recollection about how the cash book came into his possession. Shown an affidavit he had executed at a time more nearly contemporaneous with the event, he stated the affidavit was correct. In the affidavit he had sworn that he found the cash book in a safe in the taxpayer's office and that the taxpayer had not given it to him." (Ap. 24a).

* * * * *

"Footnote 5. The taxpayer contends erroneously that this was the use of an ex parte affidavit as evidence." (Ap. 24a).

The above quotation from the opinion fails to show that the testimony of Mr. James A. Hill further corroborates the testimony of petitioner and other witnesses that he, the petitioner, gave the cash books to the agent.

The emphasized portions of the extracts of the opinion indicate the importance of this fact as evidence petitioner had no knowledge of the false entries in his records. That such fact would exculpate petitioner of knowledge of the false entries is in effect conceded by the language of the court below.

Petitioner and three witnesses gave unimpeached testimony to the fact in question. The affidavit in question was accepted as true in spite of the overwhelming weight of the evidence to the contrary. The affidavit was *ex parte* and was not admissible evidence under rules of the Tax Court. (Rules of Practice of Tax Court of the United States, Rule 31 (b), Ap. p. 3a).

In the case of *U. S. v. Mack*, 249 F.2d 321 (7th Cir. 1957), the court there had identically the same issue before it. In that case the court said (249 F.2d at 322):

> "This appeal is from a judgment entered upon the verdict of a jury finding appellant guilty of violation of the Internal Revenue Code of 1939, 28 U.S.C.A. Sec. 145 (b)." (Ap. 29a).
>
> * * * * *
>
> "(3) Appellant next contends that the trial court improperly excluded from evidence the affidavit of the witness Bahlenhorst attached to his deposition as an exhibit. . . . The deposition was taken at his home on February 27, 1954, and he died on March 2, 1954. He was examined at length by counsel for both sides. He identified the affidavit of January 15, 1954, saying that he signed

it, that it was executed voluntarily and that *the facts recited were true and accurate*. The affidavit was attached to the deposition as Exhibit No. 1. The deposition was read in evidence and appellant then offered the Exhibit No. 1 in evidence. The court excluded the affidavit on objection by appellee on the ground that such a signed statement was competent only for impeachment purposes." (Ap. 33a-34a). (Emphasis added).

* * * * *

" . . . The affidavit sought to be admitted was an *ex parte* affidavit. It was incompetent and the court properly excluded it for the purposes offered. *Vendetti v. United States*, 9 Cir. 1930 45 F. 2d 543.

It was not offered for impeachment purposes." (Ap. 34a).

The above decision is consistent with the laws of the District of Columbia. (See 26 U.S.C. 7453, Ap. A, p. 1a) and District of Columbia Code, Sec. 14-104, Ap. A, p. 3a).

The impropriety of admitting an *ex part* affidavit in evidence is well illustrated in the instant case. The affidavit is self contradictory. The affidavit provided:

" . . . I can't remember exactly how I happened to get the small cash book referred to but I do remember that it came from the safe which the taxpayer had in his office . . . Mr. Doggett did not give me the book. . . ." (R. 10-11).

The self contradiction is obvious. It is to be further noted that the part Agent Armstrong said he *did* remember was repudiated by the findings of the Tax Court. In its findings of fact the Tax Court said:

" . . . . The cash book was kept for petitioners information and was not maintained with the

> journals and ledgers in the filing cabinet but was kept separately in Hobgood's desk drawer. When a cash book was filled it was stored on the top shelf of a large wooden cabinet." (Ap. 8a).

This finding of fact by the Tax Court is properly substantiated by the evidence. (R. 30a).

It is respectfully submitted that due process required a fair consideration of the evidence and that the court below cannot properly refuse to take cognizance of the cumulative evidence of three unimpeached witnesses because such evidence happens to be favorable to the petitioner.

It is to be noted that if the testimony of these three witnesses and the petitioner was not true, it could easily have been contradicted by Agent Armstrong who was present. The cash book was produced *after* the routine examination was completed. *Somebody* had to give it to Armstrong.

In the case of *In Re Murchison*, 349 U.S. 133, 136 (1955) this Court said:

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest. . . . But to perform its high function in the best way 'justice must satisfy the appearance of justice.' *Offutt v. United States*, 348 U.S. 11, 14."

These high principles seek to create standards of procedure which remove motives that would tend to produce injustice irrespective of the degree of justice

which actually results. The use of tenuous unlawful evidence to overcome and strike down substantial lawful evidence would seem to be even more repugnant to the high standards required by due process of law.

Though not pertinent to this petition, there was voluminous additional evidence favorable to petitioner which was ignored in the findings of fact of the Courts below.

(c) The Decision Below Denies Petitioner Due Process of Law by Making Findings of Fact Which Are Not Supported by Any Lawful Evidence.

The Court below said:

> "The Tax Court accepted the bookkeepers version of the matter and *found corroboration of it in a number of collateral circumstances.* (Ap. 21a) (Emphasis added)
>
> * * * * *
>
> ". . . it does *not make incredible all the direct and circumstantial evidence of the taxpayer's wrongdoing.*" (Ap. 23a) (Emphasis added)

Petitioner respectfully submits, that except for the perjured testimony of the bookkeeper, there is not one iota of direct evidence of wrongdoing by petitioner in the entire record in this proceeding.

Taxpayer further submits that the *only* circumstantial evidence or collateral circumstances in this case from which an adverse inference can be drawn is the admitted fact that petitioner went into his safe deposit box shortly after telling the agent he could not go with him.

It is to be noted that this fact is equally as compatible with innocence as it is with guilt. The adverse inference rests on two assumptions. First, it must be assumed petitioner had cash in his box. And secondly,

that he removed the cash to conceal it from the agent. An adverse inference, even if unexplained, is not adequate evidence of fraud. However, petitioner offered voluminous evidence showing that he had adequate reason for not keeping his cash in his safe deposit box, that all cash was kept in his office safe, that he was short of funds and borrowed $10,000.00 for working capital about 45 days before the lock box entry, that he had a plausible reason for entering the lock box and that he offered to go with the agent "as soon as his relief showed up," but the agent refused.

Admittedly, there were understatements of income and admittedly petitioner plead *nolo contendere* to the criminal aspects of the case. The reason for the understatements of income is known. Petitioner's reason for pleading *nolo contendere* was not satisfactory to the court below. (Ap. 26a). But neither the *nolo* plea nor the deficiency is evidence of fraud.

(d) The Decision Below Is in Conflict With a Decision of the Seventh Circuit.

As previously noted the Tax Court admitted into evidence over objection the affidavit of Agent Armstrong. This action was sustained by the Court below on appeal saying:

> " . . . Shown an affidavit he had executed at a time more nearly contemporaneous with the event, he stated the affidavit was correct. In the affidavit he had sworn that he found the cash book in a safe in the taxpayer's office and the taxpayer had not given it to him.[5]" (Ap. 24a).
>
> * * * * *
>
> "Footnote 5. The taxpayer contends, erroneously, that this was the use of an *ex parte* affidavit as evidence." (Ap. 24a).

As shown by the extract from the opinion of *U. S. v. Mack*, (pp. 16-17 of this petition) the position of the Fourth Circuit that an *ex parte* affidavit become admissible by the mere fact that the affiant states the affidavit is true is in square conflict with the position on this identically same issue as stated in the *Mack* case of the Seventh Circuit.

VII

CONCLUSION

Petitioner respectfully submits that he was systematically plundered by his bookkeeper Hobgood during his entire employment period. That in order to cover his embezzlements and to provide himself with an alibi, and in order to coerce his employer into silence if caught, that Hobgood deliberately and vindictively understated his employer's income without his employer's knowledge or consent. That, petitioner has been convicted of fraud on the barest scintilla of evidence, which scintilla of evidence is as fully compatible with innocence as it is with guilt, and that such action denies the petitioner due process of law as defined in Amendment V of The Constitution of the United States.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

DANIEL R. DIXON,
Counsel for Petitioners
808 Capital Club Building
Raleigh, North Carolina

APPENDIX

APPENDIX A

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

(a) Constitution of the United States, Amendment V:

"No person shall . . . be deprived of life, liberty, or property, without due process of law; . . ." (U.S.C., 1958 ed., page XLVI).

(b) Internal Revenue Code of 1954:

SEC. 7453. *Rules of practice, procedure and evidence.*

The proceedings of the Tax Court and its divisions shall be conducted in accordance with such rules of practice and procedure (other than rules of evidence) as the Tax Court may prescribe and in accordance with the rules of evidence applicable in trials without a jury in the United States District Court of the District of Columbia. (26 U.S.C., 1958 ed., Sec. 7453).

(c) Internal Revenue Code of 1954:

SEC. 7454. *Burden of proof in fraud and transferee . . .*

(a) Fraud.

In any proceeding involving the issue whether the petitioner has been guilty of fraud with intent to evade tax, the burden of proof in respect of such issue shall be upon the Secretary or his delegate. (26 U.S.C., 1958 ed., Sec. 7454).

(d) Internal Revenue Code of 1939:

SEC. 275. *Period of limitation upon assessment and collection.*

Except as provided in section 276.

(a). General Rule.

The amount of income taxes imposed by this chapter shall be assessed within three years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period. (26 U.S.C., 1952 ed., Sec. 275 (a).

(e) Internal Revenue Code of 1939:

SEC. 276. *Same—Exceptions.*

(a) False return or no return.

In the case of a false or fraudulent return with intent to evade tax or of a failure to file a return the tax may be assessed, or a proceeding in Court for the collection of such tax may be begun without assessment at any time.

(f) Internal Revenue Code of 1939:

SEC. 293. *Additions to the tax in case of deficiency.*

* * * * *

(b) Fraud.

If any part of any deficiency is due to fraud with intent to evade tax, then 50 per centum of the total amount of the deficiency (in addition to such deficiency) shall be so assessed, collected, and paid, in lieu of the 50 per centum addition to the tax provided in Section 3612 (d)(2). (53 Stat. 88). (26 U.S.C., 1952 ed., Sec. 293 (b).

(g) Internal Revenue Code of 1939:

SEC. 3793. *Penalties and forfeitures—*

* * * * *

(b) Fraudulent returns, affidavits, and claims—

(1) Assistance in preparation or presentation. Any person who willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a false or fraudulent return, affidavit, claim, or document, shall (whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document) be guilty of a felony, and, upon conviction thereof, be fined not more than $10,000.00, or imprisoned for not more than five years, or both, together with the costs of prosecution." (26 U.S.C., 1952 ed., Sec. 3793 (b).

(h) District of Columbia Code, 1951 ed.:

SEC. 14-104. *Impeachment of own witness-Surprise.*

Whenever the court shall be satisfied that the party producing a witness has been taken by surprise by the testi-

mony of such witness, such party may, in the discretion of the court, be allowed to prove, for the purpose only of affecting the credibility of the witness, that the witness has made to such party or to his attorney statements substantially variant from his sworn testimony about material facts in the cause; but before such proof can be given the circumstances of its supposed statement sufficient to designate the particular occasion must be mentioned to the witness, and he must be asked whether or not he made such statements and if so allowed to explain them.

(i) Federal Rules of Civil Procedure, Rule 52a:

(as amended, 329 U.S. 861, Dec. 27, 1946)

(a) Effect.

. . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

(j) Rules of Practice Before the Tax Court of the United States, Rule 31 (f):

(f) Ex parte statements are not evidence.—

Ex parte affidavits, statements in briefs, and unadmitted allegations in pleadings do not constitute evidence. (26 U.S.C., 1958 ed., Appendix, Rule 31 (f).

APPENDIX B

OPINIONS AND JUDGMENTS BELOW

T. C. Memo 1958-176

TAX COURT OF THE UNITED STATES

I. E. DOGGETT, *Petitioner*,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

Docket No. 49710. Filed September 24, 1958.

Daniel R. Dixon, Esq., for the petitioner.

Paul J. Weiss, Jr., Esq., for the respondent.

MEMORANDUM FINDINGS OF FACT AND OPINION

OPPER, *Judge*: Respondent determined the following deficiencies in income tax and additions to tax:

Year	Income Deficiency Tax	Additions to Tax—I. R. C. 1939 Sec. 293 (b)
1942	$ 5,495.27	$ 2,747.64
1943	*13,698.52	6,849.26
1944	31,333.21	15,666.61
1945	14,575.62	7,287.81
1946	7,526.82	3,763.41

* Includes Victory tax.

NOTE: This case was heard by Judge Stephen E. Rice and briefs were duly filed. After his death on February 9, 1958, the case, not having been disposed of, was reassigned to Judge Clarence V. Opper, and notice was given to the parties that any motions contemplated in connection with the proceeding should be addressed to Judge Opper and filed immediately, and that if no such motions were received within 30 days he would proceed with the disposition of the proceeding. No motions requesting rehearing or further hearing or relating in any other manner to this case have been received.

The disputed issues are:

(1) Whether the deficiencies for the years 1942, 1944, 1945 and 1946 are barred by the statute of limitations, it being conceded by petitioner on brief that appropriate waivers were executed for the year 1943.

(2) Whether petitioner's net income for each of the years 1942 through 1946 is correctly reflected by his books and records.

(3) Whether petitioner suffered any loss due to embezzlement in the years 1942 through 1946.

(4) Whether certain expenses attributable to petitioner's personal automobile are properly deductible as business expenses in the years 1942 through 1946.

(5) Whether sums expended for flowers in the years 1942 through 1946 are properly deductible as business expenses.

(6) Whether $250 paid in 1943 for attorney's fees is properly deductible as a business expense.

(7) Whether certain debits to petitioner's drawing account in the years 1942 through 1946 represented business expenses and are properly deductible as such.

(8) Whether certain storage receipts for 1946, which were reported as income by one of petitioner's corporations, are petitioner's income rather than his corporation's.

(9) Whether certain expenses which were accrued by petitioner's sole proprietorship and assumed by his corporations in 1946 are proper deductions in computing his net income.

(10) Whether certain sums were expended for taxes and insurance in 1946 and are therefore deductible.

(11) Whether any part of any deficiency is due to fraud with intent to evade tax.

Findings of Fact

Some of the facts were stipulated and are found accordingly.

Petitioner, a resident of Raleigh, North Carolina, had his income tax returns for the years 1942 through 1946 prepared by a certified public accounting firm on the cash basis. These returns were filed timely with the collector of internal revenue for the district of North Carolina. Respondent mailed to petitioner a statutory notice of deficiency, dated April 22, 1953, with respect to these years.

Petitioner operated the Strop Taxi Company in Raleigh, North Carolina, as an individual proprietorship from 1933 to April 30, 1946, when he formed two corporations, the Yellow Cab Company, Inc., and the Strop Taxi Company, Inc. Petitioner's fleet of cabs grew from 8 in 1933 to 50 at the time of incorporation.

Petitioner hired Linwood T. Hobgood as a bookkeeper in April 1941. Hobgood remained employed in that capacity until February 1947. He was 26 years of age at the time he was hired and had studied bookkeeping and typing for approximately 1 year at night school.

Petitioner informed Hobgood within the first year of his employment that petitioner's income was getting so large that he did not feel that he should have to pay the Government income tax on all of it. Petitioner instructed Hobgood to reduce these income taxes in any way he could. To this purpose Hobgood used a number of different methods during the years 1942 through 1946.

One method used by Hobgood to conceal income was to inflate the business expenses upon posting to the ledger. For example, in the months of August through December 1943, nine of the items posted to the gasoline account ledger exceeded by $100 each the amount correctly recorded in the journal. Some expense accounts were totaled before being posted, and Hobgood would overadd or overfoot these account columns in the journal and post the larger amount to the ledger. For example, the correct total of the

"Parts" account in the journal for the month of October 1942 is $1,184.21; however the total recorded is $1,284.21. These footing errors in the expense accounts totaled $1,246 in 1942 and $2,895 in 1943.

Hobgood credited many income items directly to petitioner's drawing account, thereby by-passing the "income" or "receipts" account. For example, income from the coca-cola machine, from the sale of book tickets, from the sale of old cabs and from the sale of junk or scrap was ordinarily credited directly to petitioner's drawing account. Checks for insurance recoveries amounting to $706.59, $703.98, and $676.50 were also so credited in 1942 through 1944, respectively. In addition, there were checks amounting to $930.41, $2,288.71, and $1,240.41 which were received from insurance and advertising companies in 1944 through 1946, respectively, and which were not recorded at all. Hobgood endorsed some but not all of these checks.

Another method of concealing income was by recording personal expenditures as business expenses. For example, on February 5, 1945, petitioner issued a check to the Heater Well Company for $376 to pay for a well drilled on his father-in-law's farm. This expenditure was recorded in the 1945 journal as a debit to the repairs account of the taxicab business. Petitioner's business furnished gasoline and made necessary repairs to his personal automobile. This automobile was included with the business automobiles on petitioner's books for the purpose of computing depreciation.

One of the principal methods used to understate taxable income during the year 1944 and 1945 was to fail to record some of the receipts in the journal after having properly recorded them in the cash book. During the years 1944 and 1945, the variance between the receipts as recorded in the journal and receipts as reflected in the cash book aggregated $27,825 and $10,025, respectively. Hobgood placed the withheld cash on petitioner's desk, after attaching an adding machine tape showing the amount of the daily re-

ceipts and how much had been withheld. The adding machine tape would show a figure for the amount withheld and to the left of the figure Hobgood wrote the name "Red." Petitioner is commonly known as "Red" Doggett in Raleigh. The daily receipts were correctly recorded in the cash book, and in 1944 and 1945 a smaller amount was recorded in the journal, the difference being accounted for on the adding machine tapes. For example, the correct receipts for the "day shift" on Friday, March 30, 1945, were $391. This amount is properly recorded in the cash book. The amount recorded in the journal is $341. The difference of $50 appears on the adding machine tape opposite the word "Red."

Petitioner or his wife checked the drivers' receipts almost every day. Petitioner understood the cash book. It was kept principally by Hobgood with occasional entries being made by both J. M. Neal, petitioner's personnel manager, and by petitioner. The cash book was kept for petitioner's information and was not maintained with the journals and ledgers in the filing cabinet but was kept separately in Hobgood's desk drawer. When a cash book was filled it was stored on the top shelf of a large wooden cabinet.

Only the journal and ledger were made available to the certified public accounting firm by Hobgood for the preparation of petitioner's income tax returns. The accountants were retained only to prepare returns and not to audit the books. The cash books were never made available to them.

Petitioner accumulated the withheld cash in a safe in his office and periodically removed it. During the year 1944, petitioner made 5 deposits of currency, totaling $5,185, in his wife's account in the Security National Bank. During the year 1944, petitioner made 8 deposits of currency, totaling $6,080, in his wife's account in the Bank of Lillington. On January 19, 1945, petitioner paid $2,000 in currency to the Connell Realty and Mortgage Company

as a deposit to purchase a lot, and on February 28, 1945, and March 24, 1945, petitioner made additional cash payments of $3,000 and $2,500, respectively. On February 1, 1945, petitioner paid $2,050 cash on a home.

On one occasion petitioner asked Hobgood if he thought petitioner could "get away with" the understatements of income. Hobgood told petitioner that he could until the Government checked him. Petitioner did not offer Hobgood anything to falsify the books nor did petitioner threaten to discharge him if he failed to comply with petitioner's instructions. Hobgood told petitioner that petitioner would have to assume full responsibility for the practice. Hobgood once cautioned petitioner that entirely too much was being withheld and that he had better go easy, to which petitioner replied that Hobgood should let petitioner worry for he was the one getting the money and that he would pay off when the time came.

Petitioner's reported net income, his net income as determined by respondent in the notice of deficiency and as subsequently corrected by respondent, using the "receipts and disbursement" method, and net income as computed in petitioner's brief according to the "receipts and disbursement" method are:

Year	Net income reported	Net income per respondent's deficiency notice	Net income as corrected by respondent	Net income per petitioner's brief
1942	$25,425.71	$34,459.92	$33,334.70	$28,623.80
1943	$50,766.59	*68,524.91	64,944.80	58,333.82
1944	44,573.51	84,006.49	81,383.23	66,655.19
1945	44,351.16	64,314.72	58,015.55	49,006.77
1946	15,765.54	30,702.82	31,949.49	16,480.00

*Victory tax net income reported in 1943—$53,069.67.

**Victory tax net income per deficiency letter—$70,364.73.

Petitioner computed his net income in his brief by deducting the following items from respondent's corrected net income computation:

	1942	1943	1944	1945	1946
Embezzlement loss	$1,418.35	$4,095.00	$12,838.65	$7,950.59	$ 2,706.91
Personal living expenses which respondent estimated were paid by petitioner's business	600.00	600.00	600.00	600.00	200.00
Depreciation on personal automobile—amount alleged by petitioner to be attributable to business use	335.91	335.91	59.32		
Gasoline for personal automobile—amount alleged by petitoner to be attributable to business use.	57.79				
Flowers purchased by by business	77.26	58.21	160.50	168.76	97.35
Attorney fees		250.00			
Storage receipts					4,880.40
Accounts payable transferred to corporations					7,144.98
Taxes and insurance					802.35
Debits to petitioner's drawing account which petitioner alleges represent business expenses:					
Salary adjustment	6.00				
Accounts receivable	9.50		4.50	1.00	
Uniforms and advances	79.99	340.00			
Cash receipts and expenses	1,937.85	388.56	277.81	129.45	
Chicken feed	168.25	483.30	357.90	55.98	137.50
Wages—decedent			420.36	102.50	
Bad check				2.50	
Totals	$4,710.90	$6,550.98	$14,728.04	$9,008.78	$15,469.49

Respondent also computed petitioner's net income by using the "net worth plus nondeductible expenditure" method, except for cash on hand. In doing so, respondent used as figures for petitioner's living expenses for 1945 and 1946 $20,232.26 and $20,936.94, respectively. Included in these figures are $5,284.28 and $5,734.06, respectively, which consist of cash collected and cash charged to petitioner's drawing account.

When petitioner incorporated his taxi business in 1946, he transferred the following assets and liabilities to the corporations:

Assets

Cash in Banks	$ 7,236.75
Accounts Receivable	201.50
Advances and Uniforms	2,079.54
Automobiles	71,664.98
Furniture, Fixtures and Equipment	7,085.13
	$88,267.90

Liabilities

Notes Payable, 1st Citizens Bank	$ 649.25
Notes Payable, Encyclopedia Britannica	414.16
Employees' F.O.A.B. Victory Tax	626.47
Reserve for Depreciation	63,933.04
Accounts Payable	7,144.98
Capital Stock, Yellow Cab, Inc. & Strop Taxi, Inc.	15,500.00
	$88,267.90

There was an additional liability of $5,813.83 for wages which accrued prior to the date of incorporation. An adjusting entry was made on the books of the corporations at the end of their fiscal years, April 30, 1947, crediting expense and debiting petitioner's account for this sum.

During 1946 Yellow Cab Company, Inc., conducted its business without a lease and without payment of rent on real estate owned by petitioner. It reported $7,320.60 as income in 1947 for storage rentals which were received by petitioner personally between September 6, 1946, and February 4, 1947. This income belonged to petitioner and he owed no part of it to either of his corporations in 1946, because petitioner, and not his corporations, rented the real estate for storage purposes.

Petitioner's net income, determined by computing the increase in net worth plus nondeductible expenditures, without considering unstipulated additional living expenses for 1945 and possible increases in cash on hand, was not less than $30,955.79, $62,019.04, $68,544.58 and $50,064.96 for the years 1942 through 1945, respectively.

During the years 1942 through 1946, petitioner maintained a safety deposit box at the Wachovia Bank & Trust Company in Raleigh, North Carolina. During the initial stages of the investigation, on Friday, May 9, 1947, at approximately noon, respondent's revenue agent asked petitioner if he would accompany the agent to the Wachovia Bank & Trust Company to inventory the contents of petitioner's safety deposit box. Petitioner informed the agent that he could not leave his place of business. An appointment was made to inventory the contents of petitioner's box on the following Monday, May 12, 1947, and no cash was found. Petitioner entered his safety deposit box less than an hour after the agent left his place of business on Friday, May 9, 1947.

On February 21, 1951, petitioner pleaded *nolo contendere* to and was convicted on a 3-count indictment charging the filing of false and fraudulent income tax returns with intent to evade for the years 1944 through 1946. On April 6, 1951, petitioner was fined $30,000 and the costs of prosecution.

Petitioner's returns for each of the years 1942, 1944, 1945 and 1946 were false and fraudulent with intent to evade tax; and some part of each of the deficiencies in income tax for the years 1942 through 1946 was due to fraud with intent to evade income tax.

OPINION

After this case had been heard but before it could be decided, the judge who had presided at the trial died. The parties were given an opportunity to apply for a further hearing.[1] In the event that either considered it necessary

---

[1] "Judge Stephen E. Rice, to whom this proceeding was formerly assigned, having died on February 9, 1958, notice is hereby given that this proceeding will be reassigned to Judge Clarence V. Opper.

"It is not anticipated that any rehearing or reargument will be necessary in connection with this proceeding, since the entire file and record herein, together with briefs, are being transferred to Judge Opper. However, should any motions be contemplated in

for the deciding judge to see and hear the witnesses, they could have done so. No such application has ever been made in all the time that has elapsed since that opportunity was tendered. Nevertheless, the entire proceeding reduces to an irreconcilable conflict of testimony.[2] Petitioner accuses his bookkeeper of continuous and systematic embezzlements from petitioner's business. The bookkeeper categorically denies any misappropriations. He testified that petitioner instructed him to falsify the business records thereby reducing petitioner's apparent taxable income, and that the difference largely went to petitioner in cash. This account, naturally, is contradicted by petitioner's testimony.

Both versions, of course, cannot be true. Our primary responsibility is thus to marshal that arrangement of the facts, as they appear in the written record, which seems to us most nearly to accord with what actually happened.

Our findings, which are dispositive of most of the issues, reflect the conclusion that the statements of the bookkeeper rather than those of petitioner are entitled to credence. This result has been reached on the whole record and for a number of reasons, among which are the following:

First, the bookkeeper has no such apparent interest in the outcome as has petitioner. No charges against him are, or for all that appears, ever have been pending against him.[3] Any motive for departing from the truth would

---

connection with this proceeding they should be addressed to Judge Opper and be filed immediately. If no such motions are received within 30 days, Judge Opper will proceed with the disposition of this proceeding."

[2] "Respondent states that either Hobgood or petitioner is a liar To this, petitioner agrees wholeheartedly." (Petitioner's reply brief, p. 54.)

[3] Petitioner states in his brief (p. 32) that "[i]t is to be borne in mind that the full disclosure of the extent of the embezzlement has only been discovered in preparing data for *this proceeding*." Petitioner quotes from the General Statutes of North Carolina and

hence tend to tip the balance in favor of the bookkeeper's veracity. Second, petitioner's conviction on his plea of *nolo contendere* is at least a sufficient justification for doubting the truth of his statements. *Lillian Kilpatrick*, 22 T.C. 466, affd. (C.A. 5) 22 F. 2d 240. Third, the other evidence, including testimony of presumably unbiased witnesses, supports for the most part the bookkeeper's statements. Fourth, the concealed understatements of income,[4]

---

concludes "it is apparent that a prosecution for embezzlement may be initiated in North Carolina *at any time* after the offense has been committed." At the trial Holgood gave the following answers to respondent's questions:

"Q. Now, did you personally appropriate any of the money which you withheld for Doggett?

A. No, sir.

Q. Has Doggett ever accused you of doing so?

A. No, sir.

Q. Before this trial?

A. No, sir.

Q. Has he ever preferred criminal charges against you in any court?

A. No, sir.

Q. Has he ever brought any civil action against you seeking to recover any sum?

A. No, sir.

Q. Have you ever been convicted of a felony or a misdemeanor?

A. No, sir."

[4] These understatements are set forth in petitioner's reply brief (p. 64) as follows:

	Per Return	Net Worth Statement Per Petitioner
1942	$25,425.71	$30,955.79
1943	50,766.59	62,019.04
1944	44,573.51	68,544.58
1945	44,351.16	50,064.96
•••	•••	•••

According to these figures petitioner's understatement of net income in each of the years 1942 through 1945 is $5,530.08, $11,252.45, $23,971.07 and $5,713.80, respectively. The 4-year total of income per return, income per net worth statement, and understatement of income is $165,116.97, $211,584.37 and $46,467.40, respectively.

even on petitioner's "net worth" computations,[5] are so large for the period 1942 through 1945 that petitioner must have been aware of them and even without more they thus tend to support respondent and his witness and to lead to an inference of fraud which agrees with their theory. *Abraham Galant*, 26 T.C. 354, 365. The so-called "routine adjustments" do not by any means account for the difference nor rebut the evidence of guilt, even if they should, as petitioner contends, fail to add to implications of dishonesty.

There is a great deal of testimony as to whether it was petitioner or his accountant who finally produced the significant[6] cash books. We have made no finding on this point in view of the hopeless conflict of testimony. But one aspect of the case which petitioner makes no effort to justify is that the revenue agent had been working on the case for several weeks. Admittedly petitioner called in no outside assistance until at the conclusion of the examination a deficiency was proposed. Admittedly also, until this moment no offer of the cash books had been made to the examining agent. Yet on petitioner's own theory this was the one kind of book with which he was familiar. Why were they withheld throughout the investigation? And who but petitioner could have withheld them?

There are, to be sure, discrepancies in the testimony of both principal witnesses. This is not surprising with reference to events by now much more than 10 years old. But the principal charges made by the bookkeeper are credible

[5] "It is further maintained that the net worth statement provides the only reliable determination of the incomes of the petitioner for the years involved." (Petitioner's brief, p. 102.)

[6] "Petitioner's position in respect to the fares reported in the cash book but not reported in the journal has been extensively developed. This item in the amount of $14,992.41 is the most important single item in this entire proceeding." (Petitioner's reply brief, p. 71.)

and consistent and we find no such infirmity in them as to require their complete repudiation.[7]

This is not a case where any question of burden of proof can successfully be raised. *Cf. Oscar G. Joseph*, 32 B.T.A. 1192. Once the bookkeeper is believed as to petitioner's obeyed instructions to falsify the books in order to understate income, all the proof of fraud necessary is furnished. *Jack M. Chesbro*, 21 T.C. 123, affirmed *per curiam* (C.A. 2) 225 F. 2d 674, certiorari denied 350 U.S. 995; *Fred Ascher*, 2 B.T.A. 1257.

The situation as to the year 1946 is somewhat different. The admitted understatement of income for that year is so small that possibly were it the sole evidence of fraud we should be inclined to hold that respondent had failed to sustain his burden. But in the context of all that had previously transpired, including the pattern of fraud for the prior years, Hobgood's continuing concealment under petitioner's instructions and the failure of petitioner to make any effective rebuttal of respondent's evidence, we think it would be impossible to conclude that fraud had not been proved for the year 1946 as well as for each of the preceding 4 years.

Respondent's burden of proving fraud having been satisfactorily met for all of the years, the proposed deficiencies are not barred by the statute of limitations. The burden of proving error in the deficiencies determined consequently rests upon petitioner. *Leonard B. Willits*, 36 B.T.A. 294.

Petitioner relies heavily on the net worth computation of income to show that at least some funds were embezzled and that his income was not as large as contended by respondent. Although the parties have stipulated petitioner's

[7] Even if we assume on this branch of the case that some of the proceeds of the large understatements stuck to the bookkeeper's fingers, that would not be inconsistent with petitioner's fraud. Only if all of it was taken without petitioner's knowledge would the bookkeeper's testimony fail.

net worth to a large degree there were no figures for cash on hand in any of the years, and this item was expressly left open for proof. Respondent having proved fraud in each of the years, the burden is upon petitioner to prove error in the deficiency notice. Petitioner has admitted to keeping cash on hand and has failed to prove that this did not increase in each of the years in issue. He has accordingly not proved that his income for these years is correctly reflected by the net worth computation.

Respondent relies on the "receipts and disbursements" method to verify his deficiency determination. Petitioner has not shown that this method is less accurate than the net worth method. To the contrary, all of the evidence tends to indicate that respondent's computation of receipts and disbursements is the more precise method and should therefore be accepted. See *Emilie Furnish Funk*, 29 T.C. 279.

In addition to the net worth computation, petitioner uses two approaches to attack respondent's computations—his personal testimony and cross-examination of respondent's agent. Since we consider petitioner's testimony unworthy of belief, we have no evidence that petitioner suffered embezzlement losses and therefore no deduction of this nature may be allowed. There is likewise no evidence that the expenses relative to his personal automobile and the flowers are ordinary and necessary expenses of his business, and no proof that respondent's estimate of the personal expenses of petitioner which were paid by his business is in error. It is impossible to conclude from the record that any part of the "debits to drawing account" represent deductible expenses. Although the attorney fees might well be deductible if they were in fact expended for the purpose assumed by respondent's revenue agent, his examination is hardly proof of the nature and payment of the expense, and the same may be said in regard to the agent's testimony in regard to the item of "taxes and insurance." The attorney, to whom the fee was allegedly paid, was called as

petitioner's witness and yet no attempt was made to elicit testimony on this point.

The facts found involving the storage receipts in 1946 show that petitioner, and not his corporations, earned and received that income. Petitioner's contention that the transfer of accounts payable to his corporations in the same year constitutes payment of an expense, or that payment was made by the corporations as his agent, cannot be sustained even if it may be assumed that these accounts payable represents expenses which might be deductible. Petitioner, a cash basis taxpayer, did not pay the expenses in 1946. There being no evidence that petitioner was in the taxi business subsequent to the incorporation, he cannot be said to have been doing business through an agent. *Citizens Nat. Trust & Savings Bank* v. *Welch*, (C.A. 9) 119 F. 2d 717. The increased deficiency for that year, however, must be disapproved even if it could be said that this was validly claimed. As to this, the burden was on respondent and we find no adequate evidence to sustain his position as to the claimed increase.

Petitioner, having failed in his burden of proof, the deficiencies as determined are sustained, except as respondent has conceded smaller deficiencies for 1942 through 1945. And for the reasons already stated, the additions to tax for each year are likewise approved.

Decision will be entered under Rule 50.

TAX COURT OF THE UNITED STATES

Docket No. 49710.

I. E. DOGGETT, *Petitioner*,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

Decision

Respondent having on November 17, 1958 filed a recomputation of tax for entry of decision in accordance with Memorandum Findings of Fact and Opinion herein, filed September 24, 1958, and this proceeding having been called from the Washington, D. C. calendar on December 17, 1958, and petitioner not having appeared in opposition to respondent's computation, now, therefore, it is

ORDERED and DECIDED: That there are deficiencies in income tax and additions to tax as follows:

Year	Income Tax	Additions to Tax—I. R. C. 1939 Sec. 293 (b)
1942	$ 4,776.49	$ 2,388.25
1943	13,201.92*	5,419.37
1944	29,079.99	14,540.00
1945	9,662.26	4,831.13
1946	7,526.82	3,763.14

* Includes Victory tax.

(Signed) CLARENCE V. OPPER
Judge.

Enter: Entered Dec. 18, 1958

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 7915.

I. E. DOGGETT, *Petitioner*,

VERSUS

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

ON PETITION TO REVIEW THE DECISION OF THE TAX COURT OF THE UNITED STATES.

(Argued October 21, 1959. Decided March 8, 1960.)

BEFORE SOBELOFF, CHIEF JUDGE, AND SOPER AND HAYNSWORTH, CIRCUIT JUDGES.

Daniel R. Dixon for Petitioner, and Carolyn R. Just, Attorney; Department of Justice, (Charles K. Rice, Assistant Attorney General; Lee A. Jackson and I. Henry Kutz, Attorneys, Department of Justice, on brief) for Respondent.

HAYNSWORTH, Circuit Judge:

The principal question arises out of the imposition of fraud penalties on income tax deficiencies for the years 1942-1946. Though the taxpayer admits the presence of false entries in his books during the years 1942-1945 and unrecorded and unreported receipts during 1946, he earnestly attributes all fault to his bookkeeper whom he

charges with embezzlement and perjury. The bookkeeper, as earnestly, protests his innocence of those crimes, but admits he falsified the records, under taxpayer's instructions, for the purpose of concealing income.

The Tax Court accepted the bookkeeper's version of the matter and found corroboration of it in a number of collateral circumstances. The taxpayer finds in those and other collateral circumstances such support of his own version of the matter that he asks this Court to hold that findings based upon the bookkeeper's testimony were clearly erroneous.

The question is one of fact. We cannot say the Tax Court was clearly wrong in its resolution. We must, therefore, accept its findings.

The taxpayer, a man of minimal education, achieved remarkable success as the proprietor of a taxicab business in Raleigh, North Carolina. During the years in question, the Tax Court found that he had net income, respectively, of $33,334.70, $64,944.80, $81,383.23, $58,015.55 and $31,949.49.[1] The Tax Court approved deficiencies for those years of $4,776.49, $13,201.92, $29,079.99, $9,662.26 and $7,526.82, the total of the deficiencies before interest and penalties being $64,247.48.

To some extent, the deficiencies were attributable to adjustments which, in themselves, carry no implication of fraud. Other portions of the deficiencies, however, were the direct result of falsified records. Fraud, there clearly was; the only question is whose.

The bookkeeper testified that he was employed by the taxpayer in 1941. Within a year thereafter, he says, the taxpayer told him he did not feel he should pay taxes upon all of his income and instructed him to find ways to reduce the tax obligation. There followed systematic overstatement of expense items and understatement of receipts.

[1] As of April 30, 1946 the proprietorship was incorporated. For the proprietorship, 1946 was a short year.

which continued, in varying forms, through the years in question.

In 1942 and 1943 one of the principal methods of falsification was to overfoot expense accounts in the journal and post the inflated total to the ledger. Other items, correctly recorded in the journal, would be overposted by $100.00, or some other even amount, in the ledger.

During 1944 and 1945, one of the principal means of understatement of income was the withdrawal of a portion of the cash receipts from cab operations before the balance was deposited in the bank and recorded in the journal. There was testimony that the taxpayer, or his wife, carefully checked the cash receipts from cab operations each day and correctly recorded the total in a cash book, which the taxpayer kept apart from the other books and records. Such cash receipts, correctly recorded in the cash book, were understated in the journal. A number of adding machine tapes were introduced in evidence which showed a subtotal labeled "Bank" which was in agreement with the receipts as recorded in the journal, an additional item labeled "Red," the taxpayer's nickname, and a final total which was in agreement with the receipts as recorded in the cash book. The bookkeeper testified that he prepared such tapes and gave them to the taxpayer as a means by which the taxpayer could reconcile the cash book with the bank account and the journal.

In 1946, as well as other years, some receipts, other than cash receipts from cab operations, were either unrecorded or were credited directly to taxpayer's drawing account without having been recorded in any income or receipts account.

The taxpayer brushes aside the testimony of the bookkeeper as perjured, and seeks to avoid the finding that he was the profiteer and that his income tax returns were fraudulent, by concentration upon a permissible inference that the bookkeeper was an embezzler.[2]

[2] The bookkeeper testified that the taxpayer got all of the money and that he took none.

First, the taxpayer points to the fact that his drawing account debits were overfooted by an aggregate of $172.35 in 1942 and by an aggregate of $1200.00 in 1943, these entries being offset by underfooting cash debits. While these amounts are relatively small, the taxpayer finds them very significant, for they are inconsistent with a purpose to conceal taxable income to him, but they are consistent with his premise of embezzlement by the bookkeeper. Because of the number and frequency of the entries which aggregate these small totals, he finds no room for an inference that they were made inadvertently, and he dismisses the bookkeeper's explanation that they were made during moments of pique.

Had the Tax Court rejected the bookkeeper's explanation of these entries and accepted the taxpayer's premise as to these, it need not necessarily have exculpated the taxpayer. A bookkeeper who is willing to falsify records for the employer's dishonest purposes may have less resistance than others to the temptation to secure similar unlawful advantage for himself. Proof that he embezzled some small items may warrant an inference that he was the sole wrongdoer, but it does not make incredible all of the direct and circumstantial evidence of the taxpayer's wrongdoing.

The taxpayer next refers to his testimony, supported by that of his wife and one of his employees, that he voluntarily produced the cash book and gave it to the revenue agent, from which he argues that the Tax Court was required to draw the inference that the taxpayer was not informed of the discrepancies between the cash book and the journal.

The testimony, if believed, would support the inference. Neither the accountant who, without audit, prepared the tax returns nor the revenue agent had seen the cash book until the revenue agent's examination approached completion. The revenue agent had gone far enough to suggest, tentatively, deficiencies totalling approximately $8,500.00.

a relatively small amount. To this suggestion, the taxpayer says he objected. During the course of the discussion, he says he stated his cash book would prove he owed no additional tax and, thereupon, he produced the book. Since the cash book made apparent the fictitious nature of many entries in the journals, it was the key that opened the door to further inquiry and to the fraud charge. If the taxpayer knew of the discrepancies between the cash book and the journal, it would have been an unreasoned thing to have done what he says he did.

The Tax Court, however, was not obliged to accept this testimony. Aside from the improbabilities which inhere in it,[3] there was the testimony of the revenue agent. That official testified at the trial that he had not seen the cash book until his routine examination was complete, but he had no present recollection about how the cash book came into his possession. Shown an affidavit he had executed at a time more nearly contemporaneous with the event, he stated the affidavit was correct. In the affidavit he had sworn that he found the cash book in a safe in the taxpayer's office[4] and that the taxpayer had not given it to him.[5]

The Tax Court found support for its finding in the fact that the taxpayer entered his safety deposit box in a bank on the afternoon of the day the agent requested a joint inventory of the box. The taxpayer accumulated large sums in currency and the amount of it was particularly important to a net worth investigation. The taxpayer said he was unable to leave his office when the request was made, but agreed to go with the agent on the agent's next workday, a Monday. Within an hour after the agent left for the day on Friday, the taxpayer entered his deposit

[3] How the taxpayer could have thought the cash book could prove he owed no tax is not apparent.

[4] This was a safe used by the taxpayer for his personal purposes.

[5] The taxpayer contends, erroneously, that this was the use of an *ex parte* affidavit as evidence.

box. When he, with the agent, again entered the box on Monday, no currency was in it.

The taxpayer offered a reason, though one of no apparent urgency, for his entry and testified that he had stopped keeping currency in his deposit box because his wife had access to it. Such explanations may modify the force of the adverse inference to be drawn from the entry, but they do not destroy it.

Along other byways the parties hotly contest the inferences to be drawn from particular facts.

A computation of the bookkeeper's net worth, the Commissioner contends supports the bookkeeper's testimony that he did not receive or take anything except his salary. The same computation convinces the taxpayer there must have been some supplementation of his salary. To the Commissioner, the fact that the bookkeeper has never been charged with embezzlement, or any other crime, raises one inference, but, to the taxpayer, justifies none. The fact that certain unreported receipts were in the form of checks which were endorsed by the bookkeeper, seems to the taxpayer compelling proof of embezzlement, but, under the circumstances, the Commissioner does not draw the same inference from the evidentiary fact.

All of this only emphasizes the factual nature of the question. Particular facts, the ultimate inference and collateral inferences along the way were all disputed. The issue was one of fact, and the Tax Court's resolution of it was not clearly erroneous.

Choosing between permissible inference is a selective process. When the choice is made by the tribunal whose duty it is to make the choice, it does not mean, as the taxpayer suggests, that alternative inferences were ignored or that evidence which might have supported some other finding of subordinate fact was disregarded. Its findings and opinion make it plain that here the Tax Court did neither. What it said bears every indication of a fair and objective approach to it's fact-finding duty.

The taxpayer complains that the Tax Court, which found his testimony less credible than that of his bookkeeper, took note of the taxpayer's convictions, upon a plea of *nolo contendere*, of having filed fraudulent income tax returns for the years 1944 through 1946. Again, the taxpayer attempts to explain the plea, but the Tax Court clearly had the right to consider the conviction when called upon to determine the credibility of the taxpayer's testimony in the light of the conflicting testimony of the bookkeeper and the other evidence.[6] Fear of imprisonment when indicted in a district other than that of his residence is not a satisfying explanation of the plea, but it is the conviction, not the plea, which is properly used to impeach the witness. It was so used here and there was no error in the Tax Court's advertence to it.

With respect to the year 1946, the taxpayer contends that receipts from a storage garage should have been attributed to one of his corporations, rather than to him, and that payment by the corporation of payables accrued at the time of incorporation gave him the right to deduct them on his individual return.

When, in 1946, the taxpayer incorporated his taxi business, he retained individual ownership of a storage and parking garage which also served as a base of operations for the taxicab company. The taxicab company, without a lease, was permitted to use the garage for its purposes. Rental receipts from the general public for parking and the storage of cars were run through the books of the cab company and then withdrawn by the taxpayer.

Since there was no lease and the cab company paid no rental for the building, the Tax Court was justified in finding the parking and storage receipts to be receipts of the taxpayer, not of the corporation.

This cash basis taxpayer, when he incorporated his business, transferred to the new corporation miscellaneous

[6] *Masters* v. *Commissioner*, 3 Cir., 243 F. 2d 835; *Kilpatrick* v. *Commissioner*, 5 Cir., 227 F. 2d 240.

assets and liabilities, including account payable, of some $7,144.98. To the extent these payables arose out of the business they should be deductible by someone, but the taxpayer, an individual on the cash basis, is met with the objection that he did not pay them.

Perhaps he could have provided for the payment in the course of these payables by the corporation as his agent, but he did not do that. What he might have done is not so important as the fact that he did not commit himself at the time. To reserve the right, after the event, advisedly, if advised at all, to attribute the deduction to the corporation or to its sole stockholder, offends notions of justice in taxation. That one or the other should be allowed to claim the deduction, therefore, does not require the conclusion that the individual cash basis taxpayer, who chose to transfer the obligation without payment, is now entitled, as a matter of law, to claim what he did not then claim unequivocally.[7]

The Tax Court's findings are supported by the evidence. We find no error of law.

Affirmed.

---

[7] See *Citizens National Trust & Savings Bank v. Welch*, 9 Cir., 119 F. 2d 717.

Judgment

Filed and Entered March 8, 1960.

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 7915

I. E. Doggett, *Petitioner*,

vs.

Commissioner of Internal Revenue, *Respondent*.

On Petition to Review the Decision of the Tax Court of the United States.

This Cause came on to be heard on the record from the Tax Court of the United States, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the decision of the said Tax Court of the United States, in this cause, be, and the same is hereby, affirmed.

Simon E. Sobeloff
Chief Judge, Fourth Circuit.

Morris A. Soper
United States Circuit Judge.

Clement F. Haynsworth, Jr.
United States Circuit Judge.

Filed March 8, 1960
R. M. F. Williams, Jr.
Clerk.

APPENDIX C

Conflicting Opinion

U. S. v. Walter A. Mack

(U. S. Court of Appeals, Seventh Circuit, No. 11854. October 10, 1957)

Albert E. Jenner, Jr., Prentice H. Marshall, Chicago, Ill., attorneys for appellant.

Robert Tieken, U. S. Attorney, Edw. J. Calihan, Jr., Asst. U. S. Attorney, U. S. Court House, Chicago, Ill., attorneys for appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

Before Lindley, Hastings and Parkinson, Circuit Judges.

HASTINGS, Circuit Judge:

This appeal is from a judgment entered upon the verdict of a jury finding appellant guilty of violation of the Internal Revenue Code of 1939, 28 U.S.C.A., Sec. 145(b).

Appellant, Walter A. Mack, was first charged in a two-count indictment. In the first count he was charged with wilful attempt to defeat and evade a large part of the federal income taxes due and owing by W. A. Mack, Inc., a corporation, for the year 1947, by filing in his capacity as president of the corporation, a false and fraudulent income tax return showing taxes due of $70,529.16, whereas it was alleged he knew the net income of the corporation for that year was such that the tax owing to the United States was $94,067.58. The second count charged him with a wilful attempt to defeat and evade a large portion of his personal income tax s for the year 1947. Subsequently, a second two-count indictment was returned against him covering the year 1948. Its charges were identical to the first indictment save for the year and the amounts involved. Following a lengthy trial in which about ninety witnesses were called and approximately thirteen hundred exhibits were introduced in evidence, appellant was convicted under the first count of the first indictment involving the corpo

rate taxes for the year 1947 above referred to. The jury disagreed on the remaining three counts. Appellant charges the trial court erred in making improper inquiry of the jury during its deliberation, in rulings upon evidence and in prejudicial joinder of the corporate and personal counts for trial.

W. A. Mack, Inc. was engaged in the business of selling new and used automobiles. This appeal involves unreported corporate income of $48,699.59 and fictitious commission deductions of $13,585.00. The unreported income consisted generally of sales of automobiles not recorded in the corporate books and sales where amounts actually received were in excess of amounts recorded. The disallowed deductions were commissions paid fo fictitious payees. Appellant admits the evidence is sufficient to sustain the conviction and does not question that in this appeal.

We are called upon to determine four contested issues in each of which appellant vigorously contends the trial court committed reversible error. The record is voluminous and each of these issues necessarily requires a consideration of the pertinent facts. We shall treat them in some detail.

Appellant contends that the trial court made improper inquiry of the jury during its deliberation. The jury retired to deliberate upon its verdict at 4:00 o'clock in the afternoon. At 1:10 the following morning, after continuous deliberation the jury was recalled to the courtroom where the following exchange between the court and the jury took place:

> "The Court: Without telling the Court how you stand, the Court would like an indication whether there is a prospect of your agreeing on a verdict.
>
> How are you progressing?
>
> "Foreman Of The Jury: I suppose I speak for the jury. We are progressing, but we are not near any final result. I will put it that way.
>
> "The Court: Have you taken ballots?
>
> "Foreman Of The Jury: We have taken a number of ballots. I would say we have perhaps taken six or eight, approximately.

"The Court: How many of you believe that you will agree on a verdict or will be able to?

"Foreman Of The July: I don't know, I couldn't answer for anybody but myself.

"(Raising of hands by jurors.)

"A Juror: We will agree one way or the other.

"A Juror: Judge, do you think we are taking too much time with this?

"The Court: No, I don't want to hurry you. It is a little after one o'clock. Suppose you go back for another hour and try it.

"Foreman Of The Jury: At the end of the hour, Judge?

"The Court: I don't know. I will make no commitment at this time.

"A Juror: We are sorry to keep you up so late, Judge.

"Foreman Of The Jury: We want to do a good job and give everybody a chance to be heard.

"The Court: All right. Go back and see if you cannot agree on a unanimous verdict."

The jury retired to the jury room whereupon the following colloquy between the court and counsel was had:

"Mr. Calihan: I would like to make a statement in the record. I don't think there was any indication but that all twelve jurors raised their hands. They indicated that they thought a verdict would be possible. I think all of them had their hands raised. So, at least, there is some encouraging sign.

"The Court: I thought around seven or eight.

"Mr. Levinson: There was one definitely did not.

"Mr. Calihan: I looked at them. I thought they all did.

"The Court: Some of them raised their hand lightly and put it right down.

"Mr. Crowley: I think they believe they can reach a unanimous agreement if each agrees with the other.

"The Court: I think we will give them at least another hour and see how they progress."

The jury returned its verdict in open court at 3:10 the same morning.

Appellant's contention that reversible error was committed by the trial court in its inquiry of the jury during its deliberations turns upon a consideration of the language of the court set forth above from the record. It has been definitely and clearly established that an inquiry as to the division of a jury on the question of the guilt or innocence of the defendant is in itself ground for reversal. Brasfield v. United States, 272 U.S. 448 (1926). In the Brasfield case, the jury having failed to agree after some hours of deliberation, the trial judge inquired how it was divided numerically and was informed by the foreman that it stood nine to three without his indicating which number favored a conviction. In reversing the conviction, the court said: "that the *inquiry itself* (our emphasis) should be regarded as ground for reversal" and that "in general its tendency is coercive." In Burton v. United States, 196 U.S. 283, 307 (1905), the court condemned the practice of inquiring as to the extent of its numerical division. In United States v. Dunkel, 2 Cir., 173 F.2d 506 (1949), the inquiry was as to whether or not "there is a majority, a pronounced majority in agreement", with a response from the foreman that "There is a majority, very much." At that point the trial court charged the jury in the often repeated language found in Allen v. United States, 164 U.S. 492, 501 (1896), upon the duty of the jurors to agree. The court held the inquiry to be improper, and in reviewing the Brasfield case found "The language of the Court is so clear and sweeping that further question seems now impossible." We shall not attempt here to repeat the review of the cases so well considered in the Dunkel case. However, the pattern of the inquiry in all of them is as to the numerical division of the jury on the question of guilt or innocence of the defendant without stating how they stood in that regard.

In the instant case, we have an inquiry of a distinctly different character. The inquiry was directed solely to the question of the prospect of the jury agreeing upon a ver-

dict. At no time did the trial court inquire as to a division on the question of the guilt or innocence of the defendant and the jurors offered no response on that subject. In our opinion the rule laid down in the Brasfield case does not apply here. To hold otherwise would be to make it almost utterly impossible for a trial court to make inquiry of the jury as to the progress of their deliberations. It would impede the reasonable and orderly conduct of a trial. Here the inquiry was: "Without telling the court how you stand, the court would like an indication whether there is a prospect of your agreeing upon a verdict. How are you progressing?", and "How many of you believe that you will agree on a verdict or will be able to." This inquiry was one within the bounds of propriety and was not an inquiry as to a division. We find no cases holding that an inquiry as to the prospect of the jury agreeing upon a verdict was improper, prejudicial or coercive. We find no error in this inquiry.

Appellant next contends that the trial court improperly excluded from evidence the affidavit of the witness Bahlenhorst attached to his deposition as an exhibit. Bahlenhorst was sales manager of W. A. Mack, Inc. and had handled a number of the car sales in question and had received the commissions made payable to fictitious payees. He was known to be in ill health and on January 15, 1954, signed an affidavit stating the nature of his employment; the basis of his compensation during the years 1946, 1947, and 1948; his instructions to the bookkeeper during those years to draw commission checks payable to persons other than himself, these being his monthly commission; his receipt of these commission checks and his cashing them; that the proceeds of these commission checks were never paid to appellant or to the corporation; and that during those years he never turned over any currency to appellant representing over-invoice payments from used car dealers or from customers arising out of sales made by affiant. On February 23, 1954, appellant moved to take the deposition

of Bahlenhorst on the ground that he was a material witness and was incurably ill with cancer and not expected to live to testify at the trial. The deposition was taken at his home on February 27, 1954, and he died on March 2, 1954. He was examined at length by counsel for both sides. He identified the affidavit of January 15, 1954, saying that he signed it, that it was executed voluntarily and that the facts recited were true and acurate. The affidavit was attached to the deposition as Exhibit No. 1. The deposition was read in evidence and appellant then offered the Exhibit No. 1 in evidence. The court excluded the affidavit on objection by appellee on the ground that such a signed statement was competent only for impeachment purposes.

Appellant urges the importance of the affidavit as being the only evidence corroborating appellant in his defense that he knew nothing of the various transactions recited therein. However, appellant had ample opportunity to pursue this line of inquiry at the taking of the Bahlenhorst deposition. We cannot speculate as to whether counsel was precluded from asking these questions because of the physical condition of the witness. The inquiry did not seem to be limited otherwise. The affidavit sought to be admitted was an ex parte affidavit. It was incompetent and the court properly excluded it for the purposes offered. Vendetti v. United States, 9 Cir., 45 F.2d 543 (1930). It was not offered for impeachment purposes.

Appellant further contends that the trial court improperly admitted appellee's Exhibit 1228, the worksheet of Agents Guest, Clegg, and Bliss, over appellant's objection. This exhibit was introduced by appellee as secondary evidence of the records of Merrion Motor Sales, which records were not in existence at the time of trial. Exhibit 1228 is a 14-column accountant's worksheet prepared by three revenue agents. It purports to trace the sale of fourteen used automobiles by W. A. Mack, Inc., to Merrion Motor Sales, and from Merrion to the ultimate retail purchasers. Of the fourteen cars listed nine were allegedly sold in 1947 and five in 1948. Agent Bliss testified that he was given

the exhibit for use in his investigation in 1951, and that it then bore all the entries appearing in the first nine columns, viz: The selling date, the stock number of the new dealer, the make, the body style, the motor number, the serial number, the year of the car, the new car dealer's cost and the new car dealer's selling price, and that these entries were made by Agent Guest.

This information is also substantiated by the original invoices shown in evidence. Bliss further testified that all entries appearing in the 10th, 13th, and 14th columns of the exhibit, being respectively a list of check numbers in those instances where a check was used by Merrion to pay W. A. Mack, Inc., a column marked "additional" showing the names of the retail purchasers of the cars and the used car dealer's selling price, and that these entries were on the exhibit and were made by Agent Clegg. There were also certain entries by Agent Clegg in column 11 and some notations in columns 11 and 12 which were erased by Agent Bliss leaving some of these entries partly legible. Agent Bliss made the entries appearing in column 11 showing the "regular payment" made for the cars, and all of the computations appearing in column 12, these entries being the difference in amount between the entries appearing in columns 9 and 11. The exhibit recited total unreported overpayments for the year 1947 in the amount of $4186.00. Agent Bliss testified that he traced the cars listed on the worksheet through Merrion's books and records consisting of the used car register ("police book"), cancelled checks, check stubs and sales invoices, and that Merrion did not maintain any other records. Merrion testified that these records were kept in the normal course of his business, and that after the examination of his records by the agents his wife burned the records, and finally that Exhibit 1228 accurately reflected the contents of his records in respect to the purchase price paid by him for the automobiles listed. Merrion had been present at the time Agent Bliss was checking his records. After Exhibit 1228 was in evidence, appellee offered "to blank out all the in-

formation except as reflected on the payment of the cars with the motor and serial numbers" prior to handing the exhibit to the jury, to which deletions appellant objected, and the exhibit was admitted as a whole.

Appellant relies strongly on Hartzog v. United States, 4 Cir., 217 F.2d 706 [46 AFTR 1381] (1954), in support of his contention that the document was hearsay due to the failure of all three of the agents who had a part in its original preparation to testify. The Hartzog case also involved a conviction for income tax evasion. During the course of that trial, the Government put into evidence two worksheets as a substantial part of its proof of Hartzog's income for the years in question. One set of the worksheets had been prepared by Agent Baynard who died before the case came to trial. The other set was prepared by Agent Berlin who relied heavily on information secured by Baynard. Berlin at no time examined the information and materials upon which Baynard based his figures except on one occasion when he saw Hartzog's farm ledger for about two minutes. The court on appeal correctly decided that the admission of these worksheets over objection of defendant was prejudicial error, stating (at page 708):

> "Clearly the worksheets prepared by Baynard before his death, and introduced *without his testimony*, are hearsay in so far as they tend to indicate the existence of the records and checks upon which the worksheets are based; they are also hearsay as to the amounts and classification of these checks and other records." (Our emphasis).

The Court also rejected the contention (at page 710), that Berlin as a supervisor of the project could testify as to the validity of the documents. There was every indication that Baynard had used his own discretion and judgment in the classification of the information that he alone saw.

This case, on its facts, does not support appellant's contention here. Clearly, we do not have a case of an unsworn and unverified version of what an agent thought certain records contained. Agents Guest and Clegg, who preceded

Bliss in working on the exhibit in question, did not alone have access to the records which the worksheet purports to reflect. Agent Bliss did not testify as to the work of others of which he had no actual knowledge. On the contrary, Bliss testified that he had transcribed from Merrion's records and books a good part of the figures and information on the exhibit, and that he had verified the work of the other two agents in regard to Merrion's records.

> "It has long been recognized that when a record has been destroyed secondary evidence of its contents may be admitted." Corbett v. United States, 9 Cir., 238 F.2d 557, 560, 561 (1956).

This exhibit is the only one of approximately thirteen hundred exhibits in evidence of which appellant now complains. Certainly a substantial portion of the information in the exhibit is substantiated by other exhibits in evidence. It is difficult to conclude that appellant has been prejudiced by the introduction of this exhibit, particularly in view of his objection to the deletion of irrelevant portions thereof. Furthermore, the trial court instructed the jury as follows:

> "The summaries made by witnesses have no independent value as evidence. Such summaries are entitled to weight as evidence only to the same extent that you choose to give weight to the testimony of the witnesses or the books and records upon which the summaries are based. If you choose to disregard as evidence all or a part of the testimony of such witnesses or of the correctness of such books and records then you must likewise disregard so much of the summaries of the witnesses as are based on the testimony of such witnesses and the books and records you decide to disregard."

We conclude that the trial court did not commit reversible error in the admission in evidence of Exhibit 1228.

Appellant finally maintains that the trial court committed prejudicial error in denying appellant's motions to

compel appellee to elect whether it would proceed upon the counts charging attempts to evade corporate taxes or the counts charging attempts to evade personal taxes for the years 1947 and 1948. Appellant's motions were timely and were made pursuant to Rule 14 of the Federal Rules of Criminal Procedure. The court ruled that the trial of all four counts be joined in one action.

Rule 14 provides:

> "If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires."

The rule itself is addressed to the sound discretion of the trial court. It does not appear to us that appellant was prejudiced or that he was embarrassed in his defense because all four counts were tried together. On the contrary, it would seem that these charges were of the nature that should be joined in trial. In the once instance appellant's personal taxes were involved for the years 1947 and 1948, and in the other instance the corporate taxes for the same years of a corporation of which he was the active head and for which he filed the tax returns in question. We hold that the trial court did not abuse its discretion directing the joinder of the personal and corporate counts in one trial, that the joinder was not prejudicial and that appellant was not thereby deprived of a fair trial.

Appellant insists strongly that this was a "close case" and that, therefore, any claimed error must be closely scrutinized. We shall not hazard a guess on the degree of "closeness" in this case. We do say that all of appellant's claims for reversible error have been carefully considered. The record as a whole discloses to our satisfaction that appellant was fairly tried and that no prejudice was done him in the questioned rulings of the court.

The judgment is

Affirmed.